



Office of the Assistant Attorney General

Washington, D.C. 20535

August 14, 1998

The Honorable Robert A. Butterworth
Attorney General
State of Florida
The Capitol
Tallahassee, FL 32399-1050

Dear Mr. Butterworth:

This refers to Section 7 (residence confirmation procedures), Sections 13-17 and 20-21 (absentee ballot procedures), and Section 26 (criminal penalties) of Senate Bill 1402 (1998) insofar as these changes affect voters in the counties of Collier, Hardee, Hendry, Hillsborough, and Monroe in the State of Florida, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your partial response to our July 27, 1998 request for additional information on August 5, 6, 7, and 10, 1998; supplemental information was received on August 13, 1998.

As you know, the Attorney General has already precleared twenty-five of the thirty-seven sections of Senate Bill 1402 submitted to us for review under Section 5. Three sections of Senate Bill 1402 were withdrawn from our review by the State on August 6, 1998. Upon our receipt of the State's partial response to our request for additional information, we devoted a great amount of resources in responding to the State's request for expedited consideration.

In reviewing this submission, we have been well aware of the State's concerns about voter fraud; this Department shares those concerns. Procedures which enhance the integrity of the ballot are essential in ensuring that all citizens can vote and do so in a process free from fraud, coercion, or intimidation. However, the procedures used to eliminate voter fraud should not unnecessarily burden the rights of minority voters. Racially fair procedures are essential in ensuring that all citizens can vote and that their ballots are equally effective. It is with these concerns in mind that we conducted our review.

The Attorney General does not interpose any objection to Section 7 which provides a voter residence confirmation procedure, Section 13 which provides additional procedures relating to requests for absentee ballots, Section 15 which provides additional procedures relating to the return of absentee

ballots, Section 17 which provides the procedures and requirements for casting an absentee ballot in person, Section 20 only insofar as it provides procedures for notifying electors of an illegal ballot due to signature discrepancies (proposed Section 101.68(4) of the Florida Election Code), Section 21 which provides the procedures and qualifications for absentee ballot coordinators, and Section 26 (proposed Section 104.047 (1), (2), (4), and (5) of the Florida Election Code) only insofar as it provides criminal penalties unrelated to Sections 14, 16, and 20. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of these changes. See the Procedures for the Administration of Section 5, 28 C.F.R. 51.41. In addition, as authorized by Section 5, we reserve the right to reexamine these changes if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See 28 C.F.R. 51.41 and 51.43.

With regard to Section 21, we note that to the extent that the political parties adopt additional practices and procedures to implement this section, those practices and procedures, insofar as they affect voters in the five covered counties, would be subject to Section 5 review prior to their implementation. In addition, if the election supervisors of the five covered counties adopt additional practices or procedures to implement the above sections (e.g., absentee voter certificates), then those practices and procedures would be subject to Section 5 review prior to their implementation. See 28 C.F.R. 51.15.

We also note that an election supervisor in one of the covered counties stated that the procedures in Section 7 may be interpreted in such a way as to conflict with the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. 1973gg-1 to 1973gg-10. For example, if a voter registration card is returned as undeliverable and a voter is prevented from voting as a result, the State's implementation may conflict with the requirements of the NVRA. The granting of Section 5 preclearance as to Section 7 does not preclude the Attorney General or private individuals from filing a civil action pursuant to Section 11 of the NVRA, 42 U.S.C. 1973gg-9. Our understanding from the State, however, is that the procedures in Section 7 will not result in a person being suspended from voting if a non-forwardable card is returned as undeliverable.

Sections 14, 16, 20 (proposed Section 101.68 (2) of the Florida Election Code), and 26 (proposed Section 104.047 (3) of the Florida Election Code) are the remaining voting changes. Section 14 changes the certificate an absentee voter must sign. The following additional requirements must be filled out on the certificate: the reason why the voter is entitled to vote

absentee, the last four digits of the voter's social security number, the signature of a witness who is a registered voter in the State of Florida, the signing of an oath promising that the witness has not witnessed more than five (5) absentee ballots, the voter identification number of the witness, and the county where the witness is registered. In lieu of fulfilling the witness requirement, an individual may have the ballot notarized.

Section 16 changes the instructions provided with the absentee ballot. First, the ballot must be marked by the voter unless some disability or inability to read prevents a voter from so doing. Second, the instructions explain that the last four digits of the social security number must be placed on the voter certificate. The instructions also explain the witness requirements listed in Section 14 above. Finally, a warning is included in the instructions explaining that accepting a gift in exchange for a vote is a felony and providing false information on the ballot (address, name) is also a felony.

Section 20 (proposed Section 101.68 (2) of the Florida Election Code) changes the procedures for the canvass of the absentee ballot. Under the proposed changes, an absentee ballot would be "considered illegal" if there is no social security number on the ballot or if the voter has failed to follow the witness requirements in Section 14 above. The ballot would not be illegal, however, if the person who witnessed the ballot has observed more than five ballots in violation of Section 14.

Section 26 (proposed Section 104.047 (3) of the Florida Election Code) provides a new criminal violation related to the witnessing restrictions in Sections 14, 16, and 20.

While the State has satisfied its burden that Sections 14, 16, 20 (proposed Section 101.68 (2) of the Florida Election Code), and 26 (proposed Section 104.047 (3) of the Florida Election Code) were not enacted with the purpose of discriminating against minority voters, we cannot reach the same conclusion as to discriminatory effect. See Georgia v. United States, 411 U.S. 526 (1973); Procedures for the Administration of Section 5, 28 C.F.R. 51.52.

We have considered carefully the information provided in this submission and in response to our request for additional information, as well as Census data and information and comments received from other interested persons. Our analysis has revealed that during the limited time the State chose to implement the unprecleared absentee voting requirements -- where the covered counties sent absentee ballots to voters with the new state law requirements printed on the absentee voter certificate -- the votes of minority electors would have been more likely than white voters to be considered "illegal" and thus not counted. Minority voters were more likely to fail to meet one of

the State's new requirements than were white voters. For example, in Hillsborough County twice as many black absentee voters as white absentee voters failed to meet one of the State's new requirements. Likewise, in Collier County, minority absentee voters failed to meet one of the State's new requirements at a higher rate than did Anglo voters.

Racial disparities in literacy and socio-economic data may provide reasons why these changes are likely to impact minority voters more heavily than white voters. The literacy rate in the five covered counties is significantly higher for the white population than for the minority population. Significant socio-economic differences also exist between minority and white residents. There are, for example, lower rates of home and vehicle ownership by minority persons in the covered counties.

In past elections, minority voters appeared to utilize the absentee voting system at a significant rate, and in many cases at a higher rate than white voters. For example, in Hendry and Monroe Counties black voters comprised a large percentage of absentee voters in the 1996 election. Information we obtained indicates that minority voters disproportionately avail themselves of the absentee voting option because they often do not have accessible transportation to the polling place on election day and/or have jobs that do not permit time off to vote.

Election supervisors indicated that the absentee ballots were rejected primarily because they were not in compliance with the new witness requirements (e.g., witness is not a registered voter, witness did not include county of registration or voter identification number or did not bear the last four digits of the voter's social security number).

Our analysis suggests that it may be more difficult for minority voters to locate registered voters to be witnesses because the pool of available witnesses is made smaller by the fact that minority voters have lower registration rates and tend to live in areas with high minority concentrations. Moreover, the ability to meet the proposed requirements appears to be made more difficult for Hispanic voters by virtue of the fact that in two covered counties the Spanish language translation of the voter certificate is inserted in the absentee voting packet rather than appearing on the envelope as part of the absentee voter certificate itself and in two covered counties there is no Spanish language translation of the certificate at all.

Information from the counties also suggests that minority voters will be less likely to participate in absentee voting because of the new requirements. Given that minority voters appear to be filling out the absentee voter certificate incorrectly at a greater rate than white voters, it could lead to

a threat of criminal penalties being enforced disproportionately against minorities.

Although the proposed changes to the absentee voter certificate and ballot are likely to make it more difficult for all voters to cast absentee ballots, because the harm appears to fall more heavily on minority voters and thus puts them in a worse position, the state has not met its burden of showing that the proposed changes will not "lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976).

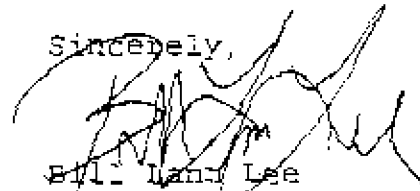
In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the additional requirements for the absentee voting certificate and absentee ballot and the criminal penalty provided for in Section 26 (proposed Section 104.047 (3) of the Florida Election Code).

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes have neither a discriminatory purpose nor effect. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, Sections 14, 16, 20 (proposed Section 101.69 (2) of the Florida Election Code), and 26 (proposed Section 104.047 (3) of the Florida Election Code) of Senate Bill 1402 continue to be legally unenforceable. See Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.20.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Florida plans to take concerning this matter. If you have any

questions, you should call Elizabeth Johnson (202)514-6018, the Chief of the Voting Section, or Colleen Kane-Dabu (213)894-2931, an attorney in the Voting Section.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Lann Lee", written over the typed name.

Bill Lann Lee
Acting Assistant
Attorney General
Civil Rights Division

cc: George L. Waas
Michael T. Cochran
Ermett Mitchell, IV